

# Overview of the New Colorado Medicaid False Claims Act

by Robert C. Blume, Jessica H. Sanderson, and Brian C. Baak

*This article provides a summary of the recently enacted Colorado Medicaid False Claims Act (CMFCA) and compares it to the federal False Claims Act, on which it is modeled. The CMFCA may lead to increased litigation and increased state recoveries over allegations of Medicaid fraud and abuse.*

In this period of ever-tightening budgets, states search vigilantly for ways to increase revenue. Effective in this pursuit is increased emphasis on the detection and punishment of fraud within government contracting programs. For example, at the end of 2009, Colorado's Department of Health Care Policy and Financing announced that between July 2007 and June 2009, Colorado Medicaid had recovered \$264 million "through fraud, waste and abuse detection efforts."<sup>1</sup>

At the national level, the False Claims Act (FCA)<sup>2</sup> is the fastest-growing area of federal litigation. In October 2009, Senator Charles Grassley (R-Iowa) reported that the federal government had more than 1,000 *qui tam* cases awaiting its decision on whether the U.S. Department of Justice (DOJ) should intervene.<sup>3</sup> In fact, new FCA cases filed in the first quarter of 2010 exceeded the number of filings in the same quarter last year and matched the number of filings seen in the final quarter of 2009.<sup>4</sup> In the first half of 2010, the U.S. Supreme Court and lower federal courts issued more than 200 decisions citing the FCA.

Further, after decades of legislative inactivity, the FCA was amended twice within the span of one year: (1) in May 2009, the U.S. Congress passed the Fraud Enforcement and Recovery Act;<sup>5</sup> and (2) in March 2010, Congress passed the Patient Protection and Affordable Care Act.<sup>6</sup> Both amendments expanded the scope and breadth of the FCA and strengthened whistleblower protections.

State activity in this area also has increased; enforcement actions and recoveries obtained under state versions of the FCA have skyrocketed.<sup>7</sup> Not surprisingly, therefore, legislators increasingly have introduced (and passed) state versions of the FCA, which frequently are viewed as revenue-generating legislation.

In keeping with this trend, on May 26, 2010, Governor Bill Ritter signed into law Senate Bill (S.B.) 10-167. Among other things, the new law enacted the Colorado Medicaid False Claims Act (CMFCA or Act). In so doing, Colorado joined more than thirty states, the District of Columbia, and a few cities that have some version of a false claims act.

Colorado, along with most other states, has enacted a false claims act that contains *qui tam* provisions. These provisions permit private individuals to bring suit on behalf of the state and share in any recovery. However, Colorado is one of only approximately ten states that created a false claims act limited to Medicaid or health-care fraud, instead of more broadly applying to fraud in connection with any state-funded programs or contracts.

This article provides a brief overview of the new Colorado law. It also compares the CMFCA to the federal FCA.

## Overview of the CMFCA

S.B. 10-167 made changes to the administration of the Colorado Medicaid program and, in connection therewith, created the

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CMFCA. Colorado already had provisions governing false Medicaid claims;<sup>8</sup> the 2010 law repeals, amends, and greatly expands on those provisions to make the CMFCA more similar to the FCA. The CMFCA also is an attempt to meet the requirements of the Deficit Reduction Act of 2005 (DRA), which provides a financial incentive for states to enact false claims acts that penalize the submission of false claims to the state's Medicaid program.<sup>9</sup> States that enact laws satisfying certain enumerated federal standards are entitled to receive an additional 10 percent of any amount recovered through a state action.<sup>10</sup> By enacting the CMFCA, Colorado may qualify for such increased recoveries.<sup>11</sup> The most notable changes under the CMFCA are discussed below.

### *Degree of Knowledge Requirement*

Before the enactment of the CMFCA, the False Medicaid Claims Act recognized two levels of scienter. First, liability attached if a person acted "intentionally," defined as having "actual knowledge of the falsity of the information and act[ing] with specific intent to defraud."<sup>12</sup> In that event, the person would be subject to the statutory maximum damages and penalties. Alternatively, liability attached if a person acted with "reckless disregard," defined as "conscious indifference to the truth or falsity of the information."<sup>13</sup> Although the prior reckless disregard standard required no "proof of specific intent to defraud,"<sup>14</sup> absent such proof, the violator was exposed to lesser damages and penalties.

Under the CMFCA, any "knowing" violation of the false claims law is actionable and the maximum damages and penalties apply equally to all levels of scienter.<sup>15</sup> Colorado defines "knowingly" as it is defined in the federal FCA, to include "actual knowledge," "deliberate ignorance," or "reckless disregard," and "does not require proof of specific intent to defraud."<sup>16</sup> This change broadens the alleged conduct chargeable under the Act.

### *Enhanced Damages and Penalties*

Under the CMFCA, any person who knowingly commits a violation is subject to a civil penalty of up to \$10,000 per claim, plus treble damages.<sup>17</sup> This represents an increase in potential exposure

from the old legislative scheme, which had a lower maximum penalty level and did not provide for treble damages.<sup>18</sup>

The new law also provides that the state or a relator must prove damages by a preponderance of the evidence.<sup>19</sup> Unlike the prior legislative scheme, however, the amount of damages before trebling, in Colorado false claims actions, likely will be determined by a jury, not a judge. This change may result in greater damage awards and less predictability.

### *Qui Tam Actions*

Before the CMFCA, only the Department of Health Care Policy and Financing could commence a civil action against a person believed to have violated the False Medicaid Claims Act.<sup>20</sup> Now, in addition to the attorney general, any private person—known as a "relator"—may bring a civil action in the name of and on behalf of the state. A relator may recover up to 30 percent of the proceeds of the action or settlement, plus reasonable expenses, attorney fees, and costs.<sup>21</sup>

*Qui tam* actions have accounted for the majority of cases under the FCA. Of the approximately 10,000 civil fraud matters from fiscal years 1987 to 2008, more than 60 percent have been *qui tam* actions, with the percentage being even higher in recent years.<sup>22</sup> The bulk of recoveries, however, come from cases where the U.S. government intervenes. In 2008, for example (the most recent year for which such numbers are available), all but approximately \$6 million of the \$1.04 billion recovered in settlements and judgments of *qui tam* actions came from cases where the government intervened.<sup>23</sup> In 2007, \$1.27 billion of the \$1.43 billion recovered through *qui tam* actions involved government intervention.<sup>24</sup>

### *Whistleblower Protections*

Under the new law, a whistleblower may bring a private cause of action for retaliation or discrimination in the terms and conditions of his or her employment by the defendant "or any other person."<sup>25</sup> This change will encourage relators to come forward with information and pursue false claims actions, and increase the number of lawsuits.

### *Attorney General Investigative Powers*

The new law grants the Colorado Attorney General broad investigative powers. This includes the power, prior to the filing of a

lawsuit, to subpoena documents and testimony pursuant to a civil investigative demand (CID).<sup>26</sup>

## Comparing the CMFCA to the FCA

The above changes to Colorado's law mirror provisions in the federal statute. There are, however, a few notable differences between the CMFCA and the FCA.

First, the CMFCA has a different scope, pertaining only to requests or demands for money or property under the Colorado Medical Assistance Act. In fact, a more general false claims act had been considered by the Colorado General Assembly on past occasions, most recent in the same 2010 session in which the CMFCA passed. That bill—House Bill 10-1357—did not pass in the senate.

Second, although the CMFCA incorporates the amendments to the FCA enacted in May 2009 as part of the Fraud Enforcement and Recovery Act of 2009 (FERA),<sup>27</sup> the CMFCA does not reflect the latest changes to the FCA made as part of the Patient Protection and Affordable Care Act (PPACA),<sup>28</sup> which President Obama signed on March 23, 2010. This means that the weakening of the public disclosure bar that occurred under the PPACA currently is not part of the CMFCA.

For example, the PPACA eliminates what was an absolute jurisdictional bar in favor of providing the DOJ with discretion over public disclosure dismissals. As amended, the FCA now states:

[t]he Court shall dismiss an action or claim under this section, *unless opposed by the Government*, if substantially the same alle-

gations or transactions as alleged in the action or claim were publicly disclosed.<sup>29</sup>

This expansion of prosecutorial veto power is not present in the CMFCA, which states:

[a] court shall not have jurisdiction over an action brought under subsection (2) of this section if the action is based upon the public disclosure of allegations or transactions . . . unless . . . the relator is an original source of the information that is the basis for the action.<sup>30</sup>

Additionally, the expansion of the "original source" exception to the public disclosure provision that occurred with the passage of the PPACA is missing in the CMFCA. Whereas the CMFCA allows whistleblowers to bring *qui tam* actions based on public disclosures only if the relator has "direct and independent knowledge" of the information and voluntarily provides it to the state before filing suit,<sup>31</sup> the FCA now eliminates the stricter direct and independent knowledge requirement in favor of "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions."<sup>32</sup> Under the FCA, recipients of federal funds face the threat of *qui tam* actions based on public disclosures if a putative relator can add anything material to publicly available information, substantially increasing the pool of potential plaintiffs qualifying as an original source.

In addition, as noted above, the CMFCA grants the Colorado Attorney General the power to subpoena documents and testimony pursuant to a CID.<sup>33</sup> FERA amended the FCA to grant the U.S. Attorney General power to delegate his or her CID authority (before the 2009 amendments, the U.S. Attorney General was re-

quired to personally approve the issuance of all CIDs). As of March 24, 2010, all U.S. Attorneys may issue CIDs in connection with their FCA investigations.<sup>34</sup> Colorado did not follow suit; the CMFCA expressly provides that the “Attorney General may not delegate the authority to issue civil investigative demands.”<sup>35</sup>

## Implications for Colorado Health-Care Providers

As with all previous years for which statistics are available, the overwhelming majority of federal recoveries from FCA settlements and judgments during fiscal year 2009 (almost \$1.6 billion) came from the health-care industry.<sup>36</sup> Although it is not as broad as the FCA, the CMFCA, with treble damages, whistleblower protections, and the Attorney General’s right to issue CIDs, significantly enhances state and relator power as it relates to Medicaid claims. Thus, law firms that practice in this area should expect to see increased activity and skyrocketing state recoveries in the coming months, as private individuals and the law firms who represent them test the boundaries of the new law.

For whistleblowers and their attorneys, the CMFCA means additional tools and protections and the incentive of increased damage awards. For health-care companies and providers and the attorneys who assist them, it amplifies the need to have in place robust policies and procedures to ensure adequate compliance. Providers should strive for increased transparency, carefully document claims, and actively monitor compliance. Knowingly false or fraudulent billing or a failure to promptly detect and disclose overpayments may lead to FCA and CMFCA liability.<sup>37</sup>

## Conclusion

The recently enacted CMFCA likely will lead to a proliferation of litigation against health-care providers, medical device manufacturers, and pharmaceutical companies, as well as an increase in state recoveries over allegations of Medicaid fraud and abuse. Effective compliance programs are essential to aid early detection of matters before they ripen into conduct actionable under the FCA and CMFCA. Further, having a strong, unified, and easy-to-use compliance policy may negate scienter and help persuade the federal and state governments not to intervene in *qui tam* litigation.

## Notes

1. Colorado Department of Health Care Policy and Financing, Press Release, “Colorado Medicaid recovers \$264 million through fraud, waste and abuse detection efforts” (Dec. 16, 2009), available at [www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251610636319&ssbinary=true](http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251610636319&ssbinary=true).

2. 31 U.S.C. § 3729-33.

3. “More than a thousand fraud cases await government action” (Oct. 7, 2009), available at [grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=23563](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=23563).

4. See [www.navigantconsulting.com/downloads/FalseClaimsCaseTrack\\_0710.pdf](http://www.navigantconsulting.com/downloads/FalseClaimsCaseTrack_0710.pdf).

5. Pub. L. No. 111-21, 123 Stat. 1617.

6. Pub. L. No. 111-148, 124 Stat. 119.

7. American Bar Association Continuing Legal Education Program Guide, “The Eighth Annual National Institute on the Civil False Claims Act and *Qui Tam* Enforcement” (June 2-4, 2010).

8. CRS §§ 25.5-4-304 *et seq.*

9. See Pub. L. No. 109-171, 120 Stat. 4.

10. See 42 U.S.C. § 1396h(a) and (b).

11. The U.S. Department of Health and Human Services, Office of the Inspector General (HHS OIG) determines whether a state’s false claims act meets the requirements of the Deficit Reduction Act of 2005 (DRA). 42 U.S.C. § 1396h. It remains to be seen whether HHS OIG will approve Colorado’s new law. Under the DRA, a state will be entitled to an enhanced share of any Medicaid recovery if its law, among other things, is “at least as effective in rewarding and facilitating *qui tam* actions” as the False Claims Act (FCA). As discussed in this article, the Colorado Medicaid False Claims Act (CMFCA) was modeled after an older version of the FCA and in many ways does not match the current version of the FCA (as amended 2010). Thus, arguably, the CMFCA provides for narrower liability than the current federal statute, and Colorado may not qualify for increased recoveries.

12. CRS § 25.5-4-304(4) (since repealed).

13. CRS § 25.5-4-304(6) (since repealed).

14. *Id.*

15. CRS § 25.5-4-305(1).

16. CRS § 25.5-4-304(3).

17. CRS § 25.5-4-305(1).

18. See CRS § 25.5-4-306(1)(b) and (c) (since repealed).

19. CRS § 25.5-4-307(3).

20. CRS § 25.5-4-306(1)(a) (since repealed).

21. CRS § 25.5-4-306.

22. Civil Division, U.S. Department of Justice, “Fraud Statistics—Overview October 1, 1986–September 30, 2008,” available at [www.justice.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm](http://www.justice.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm).

23. *Id.*

24. *Id.*

25. CRS § 25.5-4-306(7).

26. CRS § 25.5-4-309.

27. Pub. L. No. 111-21, 123 Stat. 1617.

28. Pub. L. No. 111-148, 124 Stat. 119.

29. 31 U.S.C. § 3730(e)(4)(A) (emphasis added).

30. CRS § 25.5-4-306(5)(c)(I).

31. CRS § 25.5-4-306(5)(c)(II).

32. 31 U.S.C. § 3730(e)(4)(B).

33. CRS § 25.5-4-309.

34. Redelegation of Authority of Assistant Attorney General, Civil Division, to Branch Directors, Heads of Offices and United States Attorneys in Civil Division Cases, 75 Fed. Reg. 14070, Section 5 (March 24, 2010).

35. CRS § 25.5-4-309(1)(a)(II).

36. U.S. Department of Justice Office of Public Affairs, Press Release, “Justice Department Recovers \$2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than \$24 Billion Since 1986” (Nov. 19, 2009), available at [www.justice.gov/opa/pr/2009/November/09-civ-1253.html](http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html).

37. See CRS §§ 25.5-4-305(1)(f) (penalizing the knowing submission of a “false record or statement material to an obligation to pay”) and -304(5) (defining an “obligation” to include the “retention of [an] overpayment”). ■